

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Date 16/01/2008

Appeal No. E/111 /2006-SM[BR]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME,
JAIPUR 302005.

C.C.E. JAIPUR II


M/S SHANKESHWAR(TEX) INDIA

Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 86/2008-SM[BR] dated 15.11.2007
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

M/S SHANKESHWAR(TEX) INDIA

G-617, MIA 2ND PHASE, BASNI, JODHPUR

2. Adv. / Consult SHRI. HEMANT BAJAJ ADV.

A-5, BASEMENT LAJPAT NAGAR-III, NEW DELHI-110024

3. S.D.R.

~~4. J.C.D.R.~~

5. Bar association, CESTAT, New Delhi

6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New

7. M/s Centax Publications (P) Ltd., 1512-E, Bhishm Pitamah

8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301

9. R.Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -

10. Nidheshak publications, I.P.Estate, new Delhi

11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,

12. Co, Law Institution

13. TAX INDIA, B-XI/8183, Vasant Kunj, New Delhi - 110070

14. Office Copy

15. Guard file


Assistant Registrar
(SM Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH
NEW DELHI, COURT NO. III**

Excise Appeal No. 111 of 2006-SM (BR)

[Arising out of order in appeal No.185-186(RM)CE/JPR-II/2005 dated 31.3.2005
passed by the Commissioner (Appeals) Central Excise, Jaipur]

Date of Hearing/ Decision: 15.11.2007

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

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- | | |
|--|---|
| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982. | : |
| 2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : |
| 4. Whether Order is to be circulated to the Departmental authorities? | : |
-

yes

M/s. Shankeshwar (Tex) India

Appellants
[Rep. by Mr. Hemant Bajaj, Advocate]

Vs.

CCE, Jaipur-II

Respondent
[Rep. by Mr. S.L. Meena, Authorized Representative (DR)]

CORAM: Mr. P.K. Das, Member (Judicial)

Final Order NO. 86/08-SM (BR) /Dated: 15.11.2007

Per P.K. Das:

The relevant facts of the case, in brief, are that the appellants are engaged in the manufacture of man made fabrics in their factory. On 17.10.2002, the officers intercepted a truck loaded with 205 thans of man made fabrics in transit. The driver of the truck failed to produce any duty paying documents. The

representative of the appellant in the statement admitted that the goods were removed without payment of duty. He explained that they removed the goods without the cover of invoice as the accountant was absent. The Central Excise Officers seized the said goods. The appellant deposited the duty on 4.3.2003. The adjudicating authority confiscated the seized goods and imposed redemption fine of Rs.70,000/- and also confirmed the demand of duty, which has already been deposited by the appellant. He imposed penalty of equal amount of duty under Section 11 AC of the Central Excise Act along with interest. The Commissioner (Appeals) modified the adjudication order insofar as the redemption fine was reduced to Rs.40,000/-, otherwise the appeal was rejected.

2. Ld. Advocate on behalf of the appellant submits that the representative of the appellant company on the spot explained that due to absence of the Accountant, they cleared the goods without payment of duty. He also submits that the goods were duly entered in the RG-I Register. Thus, there is no intention to evade payment of duty. He further submits that the appellant paid the duty before issue of show cause notice and, therefore, no penalty can be imposed under Section 11AC of the Central Excise Rules. He relied upon the following case laws:-

- (1) Union of India Vs. T.P.L. Industries Ltd.
2007 (214) ELT 506 (Rajasthan).
- (2) Commissioner of Central Excise Vs. Sigma Steel Ltd.
2007-TIOL-456-HC-P&H-CX
- (3) CCE, Bangalore-III Vs. Chelpark Co.(P) Ltd.
2007 (83) RLT 9 (Kar.)
- (4) Union of India Vs. M/s. Pack Point Judgment dated 6.3.07
D.B. Civil Appeal No.1556 of 2005 passed by the Hon'ble High Court of Rajasthan.

He further submits that without prejudice to the above submission, imposition of penalty under Section 11 AC is a discretionary power. He relied upon the case laws as under:-

- (1) Commissioner of Central Excise, Indore Vs. Sai Machine Tools Ltd. 2004 (170) ELT 100 (T-D).
- (2) CCE Vs. Malbro Appliances Pvt. Ltd. 2007 (208) ELT 503 (Delhi)
- (3) Sai Machine Tools Pvt. Ltd. Vs. CCE, Indore 2006 (203) ELT 15 (M.P.)

He further submits that in this case duty involved is Rs.32,300/- and imposition of redemption fine of Rs.40,000/- is highly excessive. He also submits that the appellants deposited the duty before issue of show cause notice and, therefore, redemption fine is liable to be set aside.

3. Ld. DR on behalf of the Revenue reiterates the findings of the Commissioner (Appeals). He submits that the charge of clandestine removal is admitted by the appellants. He further submits that the above case laws cited by the ld. Advocate are not relevant herein inasmuch as in the present case the appellant cleared the goods without payment of duty, which have been intercepted by the Central Excise Officers. He also submits that in all the case laws, there is no charge of clandestine removal. He relied upon the decision of the Hon'ble Bombay High Court in the case of CCE & C., Aurangabad Vs. Padmashri V.V. Patil S.S.K. Ltd. – 2007 (215) ELT 23 (Bombay). Ld. DR also submits that the Larger Bench of the Tribunal in the case of CCE, Delhi-IV Vs. Ilpea Paramount Pvt. Ltd. – 2007 (213) ELT 500 (Tribunal-LB) held that relaxation from penalty equal to duty only if duty determined is paid with interest within 30 days from the receipt of order, penalty would be 25% of duty.

4. After hearing both the sides and on perusal of the records, It is seen that the appellants removed the excisable goods on 17.10.2002 without accompanying the

central excise invoice and without payment of duty which has been detected by the Central Excise Officers in transit checking. The appellants admitted the removal of the goods without payment of duty on their statements. The reason for removal of the goods, without payment of duty is irrelevant and cannot be accepted. The Id. Advocate submitted that the goods were entered in the statutory records. I agree with the findings of the Commissioner (Appeals) that these records are only a consolidated entries in respect of each day. In the facts and circumstances of the case, it is clearly established that the appellants removed the goods clandestinely without payment of duty. The main contention of the Id. Advocate that the appellants paid the duty before issue of show cause notice, therefore, penalty under Section 11 AC cannot be imposed.

5. I find that all the case laws cited by the Id. Advocate are on particular context and there was no charge of clandestine removal. For the purpose of convenience, the said case laws are discussed herein below:-

- (1) In the case of T.P.L. Industries Ltd. (supra), it transpires that the manufacturer had contravened the provisions of Section 4 of the Central Excise Act, 1944, read with Rule 5 of Central Excise (Valuation) Rules, 1975 and other provisions of erstwhile Central Excise Rules, 1944 in respect of manufacture of P/V yarn. The Hon'ble High Court of Rajasthan relied upon the decision of the Karnataka High Court as under:-

“Further, the Karnataka High Court while considering the question opined that where the party even before issuance of show cause notice has deposited the duty, the inference can reasonably be drawn that there was no question of fraud, misrepresentation or suppression of fact, which is essential foundation for levy of penalty under Section 11 AC of the Act of 1944, at all. In coming to this conclusion, the Karnataka High Court has referred to the decision of Tribunal in Rashtriya Ispat Nigam Ltd. Vs. Commissioner of Central Excise [2003 (161) ELT 285], appeal against which has been

dismissed by the Supreme Court as reported in Commissioner of Central Excise Vs. Rashtriya Ispat Nigam Ltd. [2004 (163) ELT A53 (SC.)].”

(II) In the case of Sigma Steel Tubes (supra), it was considered by the Hon'ble High Court of Punjab & Haryana that the Commissioner (Appeals) in his order dated 23.2.2006 has recorded a finding that it was not a case of clandestine removal of the items. It has followed the judgement in the case of Rashtriya Ispat Nigam Ltd. reported in 2004 (163) ELT A-53 (S.C.)]

(III) In the case of Chelpark Co. (P) Ltd. reported in 2007 (83) RLT 9 (Karnataka), the respondent claimed duty exemption on Synthetics Adhesives under the self removal procedure and did not discharge duty on the synthetic adhesives cleared without payment of duty and also did not pay 8% of the price of the exempted goods.

(IV) In the case of M/s. Pack Point (supra), the assessee availed Cenvat credit on capital goods (machinery) before installation by filing wrong certificate.

(V) In the case of Rashtriya Ispat Nigam Ltd. Vs. Commissioner of Central Excise – 2003 (161) ELT 285 (Tribunal-Bangalore), the Tribunal set aside the penalty under Section 11 AC of the Central Excise Act, 1944 as the duty deposited before the issue of show cause notice. This case relates to eligibility of benefit of Notification No.67/95-CE dated 16.3.95, which has been upheld by the Hon'ble Supreme Court.

6. On perusal of the aforesaid decision of the Hon'ble High Courts, it is clear that none of the case is related to the clandestine removal of the goods. Therefore, the aforesaid case laws are inapplicable herein. So, I am unable to accept the contention of the Id. Advocate. The other contention of the Id. Advocate is that the imposition of penalty under Section 11 AC of the Act is discretionary power. In this regard, Id. Advocate relied upon the decision in the case of Malbro Appliances P. Ltd. (supra) reported in 2007 (208) ELT 503 (Delhi). In this case, the Tribunal imposed penalty 25% of duty determined, which was upheld by the Hon'ble Delhi High Court. But the Hon'ble Bombay High Court in the case of CCE & C, Aurangabad Vs. Padmashri V.V. Patil S.S.K. Ltd. reported in 2007 (215) ELT 23 (Bombay), after considering the amendment under Section 11 AC of the Act, 1944, observed that there is no liberty to the assessee who has availed duty intentionally by use of fraud, collusion etc. for the purpose and shall liable to pay penalty under Section 11 AC of the Act even duty deposited before issue of show cause notice.

It is seen that the Larger Bench of the Tribunal in the case of Ilpea paramount Pvt. Ltd. (supra) expressed the same view of the decision of the Hon'ble Bombay High Court. At this stage, Id. Advocate placed the decision of the Hon'ble Rajasthan High Court in the case of CCE, Vs. Banswara Syntex Ltd. reported in 2007 (212) ELT 171 (Rajasthan), in which it is held that the imposition of penalty under Section 11 AC of the Central Excise Act as well as Rule 173Q of the erstwhile Rules provide levy of maximum of penalty only, using the discretion of the authority. The relevant portion of the said decision is reproduced below:-

“30. The two provisions read together make it fairly clear that the limit of penalty provided under Section 11AC serves as a maximum limit up to which penalty could be levied but the assessing officer in his discretion may levy lesser penalty.

31. Since all the cases, as noticed by us, fall under Sections 11 AC and 173Q, therefore, no interference is called for in the orders passed by the Tribunal in reducing the penalty. Since reduction of penalty is sought to be challenged only on the basis of interpretation of Section 11 AC and not on merits, we are not further examining the question whether levy of penalty itself in each case was justified or not.

32. The appeals are, therefore, dismissed. The questions referred are answered in affirmative in favour of assessee and against the Revenue by holding that Tribunal has power to reduce the penalty imposable under Rule 173Q as well as Section 11 AC and it being not the case of Revenue that penalty was imposable under both the provisions separately and independently, the harmonious consideration of two provisions lead to a conclusion that limit of penalty provided under Section 11 AC is the maximum limit up to which penalty can be levied. Now such minimum penalty in the case of intentional breach, Section 11 AC itself has been reducible to 25% by dint of proviso referred to hereinabove. Therefore, there was no error on the part of the Tribunal in reducing the penalty when it found that levy of maximum penalty was not justified.”

7. Ld. Advocate submits that in the present case the assessee is within the jurisdiction of the Hon'ble High Court of Rajasthan and therefore, the decision of the Banswara Syntex Ltd. (supra) is applicable. In support of his contention, he placed the decision of Larger Bench of the Tribunal in the case of Collector of Central Excise Vs. Kashmir Conductors - 1997 (96) ELT 257 (Tribunal). In para 10.2 of the said decision, it has been held that where the jurisdictional High Court has taken a particular view on interpretation or proposition of law, that view has to be followed in cases within such jurisdiction. If the jurisdictional High Court has not expressed any view in regard to the subject matter and there is conflict of views among other High Courts, then the Tribunal will be free to formulate its own view. I find that the Hon'ble Rajasthan High Court in the case of Banswara Syntex Ltd. (supra) had given the interpretation of the provisions of Section 11 AC of the Act in respect of levy of maximum penalty. It has been held that the

Tribunal has power to reduce the penalty while confirming the demand of duty imposable under Rule 173Q of the erstwhile Central Excise Rules as well as Section 11 AC of the Act. Respectfully following the decision of the High Court of Rajasthan and considering the facts and circumstances that the appellants deposited the entire amount of duty before issue of show cause notice and the decision of the Hon'ble High Court of Delhi in the case of Malbro Appliances P. Ltd. (supra), penalty is reduced to Rs.8,100/- i.e. (25% of the amount of duty).

Regarding imposition of redemption fine, I find that the appellants deposited the duty before issue of show cause notice and the quantum of fine is more than the duty amount. Therefore, I reduce the redemption fine to Rs.20,000/- (Rupees Twenty Thousand only). The appeal is disposed of in the above terms.

Order dictated & pronounced in open court on 15.11.2007.

(P.K. Das)
Member(Judicial)

ckp.